

Where a portion of a plan is in issue for such a determination, the notice shall specify such portions of the plan as well as those portions of the plan which are not in issue for the determination.

(e) The notice shall afford interested persons an opportunity to submit in writing, data, views, and arguments on the proposed 18(e) determination, and the affected State an opportunity to respond to such submissions.

(f) The notice shall also state that any interested person or the affected State may request an informal hearing concerning the proposed 18(e) determination whenever particularized written objections thereto are filed within 35 days following publication of the notice in the FEDERAL REGISTER.

(g) If the Assistant Secretary finds that substantial objections are filed which relate to the proposed 18(e) determination, the Assistant Secretary shall, and in any other case may, publish a notice of informal hearing in the FEDERAL REGISTER not later than 30 days after the last day for filing written views or comments. The notice shall include:

(1) A statement of the time, place and nature of the proceeding;

(2) A specification of the substantial issues which have been raised and on which an informal hearing has been requested;

(3) The requirement for the filing of an intention to appear at the hearing, together with a statement of the position to be taken with regard to the issues specified, and of the evidence to be adduced in support of the position;

(4) The designation of a presiding officer to conduct the hearing; and

(5) Any other appropriate provisions with regard to the proceeding.

(h) Not later than 10 days following the publication of the notice in the FEDERAL REGISTER, required by paragraph (g) of this section, the affected agency shall publish, or cause to be published, within the State reasonable notice containing the same information.

EFFECTIVE DATE NOTE: At 43 FR 11196, Mar. 17, 1978, § 1902.39(a) was suspended indefinitely, effective January 20, 1978.

#### § 1902.40 Informal hearing.

(a) Any hearing conducted under this section shall be legislative in type. However, fairness may require an opportunity for cross-examination on pertinent issues. The presiding officer is empowered to permit cross-examination under such circumstances. The essential intent is to provide an opportunity for participation and comment by interested persons which can be carried out expeditiously and without rigid procedures which might unduly impede or protract the 18(e) determination process.

(b) Although the hearing shall be informal and legislative in type, this section is intended to provide more than the bare essentials of informal proceedings under 5 U.S.C. 553. The additional requirements are the following:

(1) The presiding officer shall be a hearing examiner appointed under 5 U.S.C. 3105.

(2) The presiding officer shall provide an opportunity for cross-examination on pertinent issues.

(3) The hearing shall be reported verbatim, and a transcript shall be available to any interested person on such terms as the presiding officer may provide.

(c) The officer presiding at a hearing shall have all the power necessary or appropriate to conduct a fair and full hearing, including the powers:

(1) To regulate the course of the proceedings;

(2) To dispose of procedural requests, objections, and comparable matters;

(3) To confine the presentation to the issues specified in the notice of hearing, or, where appropriate, to matters pertinent to the issue before the Assistant Secretary;

(4) To regulate the conduct of those present at the hearing by appropriate means;

(5) To take official notice of material facts not appearing in the evidence in the record, as long as the parties are afforded an opportunity to show evidence to the contrary;

(6) In his discretion, to keep the record open for a reasonable and specified time to receive additional written recommendations with supporting reasons and any additional data, views,

## **§ 1902.41**

and arguments from any person who has participated in the oral proceeding.

(d) Upon the completion of the oral presentations, the transcripts thereof, together with written submissions on the proceedings, exhibits filed during the hearing, and all posthearing comments, recommendations, and supporting reasons shall be certified by the officer presiding at the hearing to the Assistant Secretary.

### **§ 1902.41 Decision.**

(a) Within a reasonable time generally within 120 days after the expiration of the period provided for the submission of written data, views, and arguments on the issues on which no hearing is held, or within a reasonable time, generally not to exceed 120 days after the certification of the record of a hearing, the Assistant Secretary shall publish his decision in the FEDERAL REGISTER. His decision shall state whether or not an affirmative 18(e) determination has been made for the State plan or any separable portion thereof, or whether he intends to withdraw approval of the plan or any portion thereof pursuant to part 1955 of this chapter. The action of the Assistant Secretary shall be taken after consideration of all information, including his evaluations of the actual operations of the plan, and information presented in written submissions and in any hearings held under this subpart.

(b) Any decision under this section shall incorporate a concise statement of its grounds and purpose and shall respond to any substantial issues which may have been raised in written submissions or at the hearing.

(c) All decisions resulting in an affirmative 18(e) determination shall contain provisions amending the appropriate subparts of part 1952 of this chapter.

(d) All decisions concerning the Assistant Secretary's determination under section 18(e) of the Act shall be published in the FEDERAL REGISTER.

### **§ 1902.42 Effect of affirmative 18(e) determination.**

(a) In making an affirmative 18(e) determination, the Assistant Secretary determines that a State has applied the provisions of its plan, or any modifica-

## **29 CFR Ch. XVII (7-1-06 Edition)**

tion thereof, in accordance with the criteria of section 18(c) of the Act and that the State has applied the provisions of this part in a manner which renders the actual operations of the State program "at least as effective as" operations under the Federal program.

(b) In the case of an affirmative 18(e) determination of a separable portion(s) of a plan, the Assistant Secretary determines that the State has applied the separable portion(s) of the plan in accordance with the criteria of section 18(c) of the Act in a manner comparable to Federal operations covering such portions and that the criteria of this part are being applied in a manner which renders the actual operations of such separable portion(s) of the State program "at least as effective as" operations of such portions under the Federal program.

(c) Upon making an affirmative 18(e) determination, the standards promulgated under section 6 of the Act and the enforcement provisions of section 5(a)(2), 8 (except for the purpose of continuing evaluations under section 18(f) of the Act), 9, 10, 13 and 17 of the Act shall not apply with respect to those occupational safety and health issues covered under the plan for which an affirmative 18(e) determination has been granted. The Assistant Secretary shall retain his authority under the above sections for those issues covered in the plan which have not been granted an affirmative 18(e) determination.

(d) The Assistant Secretary will retain jurisdiction under the citation and contest provisions of sections 9 and 10 of the Act and the imminent-danger provisions of section 13 where such proceedings have been commenced prior to the date of his determination.

### **§ 1902.43 Affirmative 18(e) decision.**

(a) In publishing his affirmative 18(e) decision in the FEDERAL REGISTER the Assistant Secretary's notice shall include, but shall not be limited to the following:

(1) Those issues under the plan over which the Assistant Secretary is withdrawing his standards and enforcement authority;

(2) A statement that the Assistant Secretary retains his authority under